BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BYRON DAVIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,049,172
BEST WESTERN AIRPORT INN	)	
Respondent	)	
AND	)	
	)	
KANSAS RESTAURANT & HOSPITALITY ASSOCIATION SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appeal the June 17, 2011, Award of Special Administrative Law Judge John C. Nodgaard (SALJ). Claimant was awarded benefits based upon a 5 percent whole person functional impairment followed by a 66.85 percent permanent partial general disability (work disability). The SALJ found that claimant had suffered a 100 percent wage loss and a task loss of 33.7 percent, after averaging the task loss opinions of board certified neurosurgeon Paul S. Stein, M.D. and board certified orthopedic surgeon Pat D. Do, M.D. The task loss opinion of board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D. was rejected by the SALJ.

Claimant appeared by his attorney, Gary K. Albin of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the SALJ. The parties agreed that the matter was to be submitted based upon the briefs without oral argument to the Board. Gary R. Terrill of Overland Park, Kansas, was appointed as a Board Member Pro Tem in this matter to serve in place of former Board Member Julie A.N. Sample.

ISSUES

1. What is the nature and extent of claimant's disability? Respondent argues that claimant's work disability should be limited to 66.3 percent based on the task loss

of Dr. Do. Claimant argues that the work disability should be increased to75.74 percent giving equal weight to the task loss opinions of Drs. Do (32.6 percent), Stein (34.8 percent) and Murati (87 percent). The percentage of claimant's task loss is the only issue before the Board on this appeal.

FINDINGS OF FACT

Claimant began working for Best Western Airport Inn (respondent) in February 2009 as a line cook. Claimant suffered an injury while working on November 23, 2009, when he went to the freezer to get ground beef. He found a case of steak meat on top of the ground beef and tried to move the case of steak meat off the top, but, when he did, the box of steaks shifted. When that happened, claimant's back popped. Claimant reported the accident to his supervisor, Melissa Wilkinson, when she arrived later that day.

When claimant reported the accident to Ms. Wilkinson, she asked claimant if he was okay. Claimant responded, "I don't know." "I'm going to give it a little bit and see if it kind of try to work its way out."[1] Claimant continued working. After a couple of days, claimant continued to have pain. On Wednesday morning, claimant was directed by Ms. Wilkinson to go talk to "the lady up front"[2] and fill out paperwork. Claimant was directed to the Wichita Clinic for medical treatment, and he went there on Friday evening.

At some point, claimant was referred to Dr. Do. The first time that Dr. Do saw claimant was on January 13, 2010. Dr. Do became claimant's authorized treating doctor at that time. He diagnosed radiculopathy bilaterally, right more than left, and recommended physical therapy and anti-inflammatory medication.

Claimant returned to Dr. Do for follow-up on January 22, 2010. At that time, some of claimant's symptoms had improved with physical therapy, but claimant had ongoing radicular type symptoms.

At the January 22nd appointment, Dr. Do reviewed the results of a January 5, 2010, MRI of claimant's lumbar spine. The MRI report showed a paracentral disc protrusion on the right at L4-L5 with encroachment into the lateral recess and minimal encroachment into the proximal right neural foramina. There was no spinal stenosis present. Minimal central and posterolateral bulging at L3-L4 into the lateral recesses was present. But no foraminal encroachment or spinal stenosis was found.

Dr. Do's assessment on January 22, 2010, was low back pain; L3-4, L4-5 disc protrusion; and bilateral leg radiculopathy. He made treatment recommendations on that

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[1] R.H. Trans. at 14.

[2] *Id.* at 15.

date, which included continuing physical therapy and an epidural steroid injection. Dr. Do continued to follow claimant for several months until June 2010, when he released claimant from his care.

During his period of treatment, Dr. Do referred claimant to Samuel Bourn, M.D., an orthopedic spinal surgeon in Dr. Do's practice. Dr. Bourn determined that claimant was "not a great surgical candidate."[3]

According to Dr. Bourn's report of January 27, 2010 (which is apparently the first time Dr. Bourn saw claimant), claimant reported that his pain was getting worse. Dr. Bourn modified claimant's pain medications. He also discontinued physical therapy for two weeks and took claimant off work for two weeks. He scheduled claimant for a follow-up appointment in two weeks.

On February 9, 2010, claimant saw Dr. Do. At that time, Dr. Do returned claimant back to work with restrictions. He recommended that claimant follow up with Dr. Bourn for further evaluation.

The last time Dr. Do met with claimant was on June 8, 2010. At the time of this examination, he diagnosed claimant with low back pain with some radiculopathy. In his report, Dr. Do stated that Dr. Bourn "did not recommend any kind of surgical intervention."[4]

Dr. Do released claimant from his care on June 8, 2010, and assigned permanent work restrictions which included limiting his lifting and carrying to 10 pounds continuously, 20 pounds frequently, up to 50 pounds occasionally and no lifting above 50 pounds. Dr. Do also limited claimant to continuous pushing and pulling, up to 25 pounds continuously, up to 50 pounds frequently, not at all above 50. Standing and walking were not restricted. But, bending to 90 degrees was allowed only occasionally.

When Dr. Do released claimant on June 8, 2010, claimant was still complaining of some radicular type problems.

Dr. Do opined that claimant had a 5 percent whole person impairment based on the fourth edition of the AMA *Guides*. Dr. Do determined that claimant did not fit into DRE category III because he did not have actual radiculopathy: Claimant's "objective findings were not that obvious that he really – that he had objective radicular symptoms."[5]

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[3] Do Depo. at 6.

[4] *Id.*, Ex. 2 at 2 (Dr. Do's June 8, 2010, report).

[5] *Id.* at 8-9.

Dr. Do testified that claimant is going to be between DRE category II and DRE category III. In his opinion, claimant is anywhere from 5 to 7 or 7.5 percent, but he is closer to the 5 percent.[6]

Dr. Do reviewed the task list of vocational expert Steve Benjamin, and of the 92 tasks on that task list, Dr. Do found that claimant would not be able to perform 30, for a 32.6 percent task loss.

At some point after the accident, claimant returned to work in an accommodated position. When Dr. Do released claimant on June 8, 2010, claimant returned to his regular job as a line cook, where he worked from June 8, 2010, until July 18, 2010. During that month, claimant limited himself. Claimant was terminated by respondent on July 18, 2010. Claimant has not worked since being terminated by respondent.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an independent medical evaluation (IME) on July 8, 2010. Dr. Murati performed a physical examination, finding that claimant had a missing left hamstrings reflex. Dr. Murati's examination revealed a positive Patrick examination of the left hip. And there was full range of motion of the left hip, and the left trochanteric bursa was tender to palpation.

Dr. Murati diagnosed claimant with low back pain with signs and symptoms of radiculopathy; bilateral SI joint dysfunction; and left trochanteric bursitis. Dr. Murati placed permanent work restrictions on claimant which included no lifting greater than 10 pounds occasionally and 5 pounds frequently.

Dr. Murati issued an impairment rating pursuant to the fourth edition of the AMA *Guides*. For the low back pain with signs and symptoms of radiculopathy, Dr. Murati concluded claimant was in a lumbosacral DRE category III for a 10 percent whole person impairment. For the trochanteric bursitis, he found that claimant has a 3 percent whole person impairment. These ratings combine for a 13 percent whole body impairment. Upon reviewing the task list of vocational expert Jerry Hardin, Dr. Murati opined that, out of 99 non-duplicative tasks, claimant had lost the ability to perform 86 tasks, for a task loss of 87 percent.

At the request of respondent's attorney, claimant was seen by board certified neurological surgeon Paul S. Stein, M.D., for an IME on December 20, 2010. Dr. Stein provided claimant with permanent restrictions including a maximum one time per day lift of 40 pounds, occasional lifting to 30 pounds. Claimant was to avoid frequent repetitive bending and twisting of the lower back and to avoid repetitive lifting from below knuckle height and was to sit for 10-15 minutes after every hour of standing or walking, if needed.

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[6] *Id.* at 21-22.

Dr. Stein opined that claimant had a 5 percent whole person impairment based on the fourth edition of the AMA *Guides*. This is based upon a DRE lumbosacral category II. Upon reviewing Mr. Benjamin's task list, he concluded of the 92 tasks on that task list, claimant is no longer able to perform 32, for a 34.8 percent task loss. Although Dr. Murati assigned a 3 percent impairment for trochanteric bursitis, Dr. Stein acknowledged that he did not believe that claimant had impairment for that condition. Dr. Stein testified that he was not certain that claimant had trochanteric bursitis. Even if claimant did have trochanteric bursitis, the AMA *Guides* provide impairments in patients with chronic trochanteric bursitis and a limp. Claimant did not have a limp when Dr. Stein examined him.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[10]

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[7] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 209 Supp. 44-501(a).

[10] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

The SALJ found the task loss opinions of Dr. Do and Dr. Stein to be the most credible. The Board agrees. Dr. Murati's opinion is not supported by this record. The SALJ also found the functional ratings of Dr. Do and Dr. Stein to be the most credible. Again, the Board concurs. Dr. Do, as the treating physician, had the best opportunity to assess claimant and his physical and employment limitations as the result of the injuries suffered while working for respondent. The Board finds that the award of the SALJ should be affirmed in all respects.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge John C. Nodgaard dated June 17, 2011, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Byron Davis, and against the respondent, Best Western Airport Inn, and its insurance carrier, Kansas Restaurant and Hospitality Association Self-Insurance Fund, for an accidental injury which occurred November 23, 2009, and based upon an average weekly wage of $337.50.

The claimant is entitled to 12.54 weeks of temporary total disability compensation at the rate of $225.01 per week or $2,821.63 followed by 277.43 weeks of permanent partial disability compensation at the rate of $225.01 per week or $62,424.52 for a 66.85% functional disability, making a total award of $65,246.15.

As of September 20, 2011 there would be due and owing to the claimant 12.54 weeks of temporary total disability compensation at the rate of $225.01 per week in the sum of $2,821.63 plus 82.57 weeks of permanent partial disability compensation at the rate of $225.01 per week in the sum of $18,579.08 for a total due and owing of $21,400.71, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $43,845.44 shall be paid at the rate of $225.01 per week for 194.86 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of September, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
John C. Nodgaard, Special Administrative Law Judge